

Memorandum

To: Task Force on Growth
From: Karl Brendle and Sandy Coyman, Co-Chairs, Infrastructure Subcommittee
Subject: Infrastructure Subcommittee Progress Summary
Date: June 23, 2008

The subcommittee held two conference call meetings. Below we list the administrative items, work items, and observations by the subcommittee.

Administrative

1. Karl Brendle and Sandy Coyman were appointed co-chairs by Jon Laria.
2. The group determined that a full infrastructure status report by June 30 would be impractical, so the group will create a work program and provide the task force with as much policy guidance as it can by the task force's July 28 meeting.
3. A work group was formed to develop a first draft revised infrastructure survey based on the MDP 2004 survey.
4. The subcommittee will review with MDE how the department funds water and sewer infrastructure, including how MDE sets priorities.
5. MACo has asked for help from its planners and will ask the county engineers for their assessment of infrastructure issues.

Work Items

1. Determine what types of infrastructure most influence smart growth
2. Refine the MDP infrastructure survey to update and to make sure questions address #1 in this subsection
3. Produce a consolidated report of state infrastructure funding
 - a. Determine and display its geographic location by amount and purpose
 - b. Assess its effect on encouraging smart growth
 - c. Categorize expenditures
 - i. Health and safety
 - ii. Maintenance of existing infrastructure
 - iii. "Discretionary"
 - d. Document situation and provide recommendations for encouraging smart growth
4. Assess overall funding gap
5. Provide listing of potential funding sources and assess each for their practical potential

6. Explore what institutional impediments exist to cost-effectively provide infrastructure, e.g., wastewater projects must be separated into maintenance and expansion projects due to grant requirements, thus increasing costs

Observations

1. There will not be enough money to address our infrastructure needs, so we should target available funds to produce the greatest result.
2. Three groups provide local money for infrastructure:
 - a. Existing residential water and sewerage service users
 - b. New homebuyers
 - c. Businesses.
3. Two local fund collection methods exist:
 - a. Taxes
 - b. User fees.
4. Additional funding sources are state and federal grants and loans.
5. The group should read *Rooftops to Rivers*; it provides a good overview of how to think about and recognize the effects of green infrastructure.
6. Jurisdictions have contributed money to state projects to move up the state's priority list.

Note that the Maryland Municipal League has distributed an infrastructure assessment questionnaire.

Memo

To: Jon Laria
From: Brigid Kenney
CC: Terrapin Run Workgroup of the 773 Task Force
Date: June 26, 2008
Re: Workgroup Recommendations

You asked that a Workgroup review the decision in *David Trail, et al. v. Terrapin Run, LLC, et al.*, No. 44, September Term, 2007 (March 11, 2008) and report back to the Task Force. Members of the Workgroup were Roger Fink, Shelley Wasserman, and David Carey. Les Knapp participated in one of the two conference calls the Workgroup held. The Workgroup agreed that the case is significant enough to warrant comment by the Task Force. The Workgroup identifies in this memorandum three alternatives for consideration by the Task Force.

The Case

The case involved an action of the Board of Appeals of Allegany County by which the Board granted a special exception to allow the construction of a 4300 unit planned residential development on 935 acres in eastern Allegany County. The development would also include a shopping center and wastewater treatment plant. The 935-acre site is zoned "C" (Conservation) and "A" (Agricultural, Forestry and Mining). The Allegany County zoning code allows planned unit developments as special exceptions in A and C zones.

A provision of the Maryland Code defines "special Exception" as follows:

(k) *Special exception.*- "Special exception" means a grant of a specific use that would not be appropriate generally or without restriction and shall be based upon a finding that certain conditions governing special exceptions as detailed in the zoning ordinance exist, that ***the use conforms to the plan*** and is compatible with the existing neighborhood.
Article 66B, Section 1.00 (emphasis added).

The definition of "plan" includes the comprehensive plan. Art. 66B, Section 1.00 (h).

The Allegany County Comprehensive Plan (2002 update)(the Plan) includes the following under the heading Land Use Policy:

- Place primary emphasis on in-fill development of vacant, buildable land within existing communities already having adequate local streets, water, and sewer service, or in growth areas where these services can be reasonably provided.
- Give high priority to redevelopment and growth in the older urban areas compatible with their existing and historic character. The County could consider some form of tax incentive for redevelopment, particularly in areas designated for one of the state's re-development programs.
- Encourage new urban development in growth areas and serve this new development with new streets and extensions of public water and sewerage systems as capacity allows.

In the section on Urban Land Plan – Priority Funding Area, the Plan notes:

Due to the nature of Allegany County's terrain, most urban development is concentrated in a figure eight pattern between Cumberland, LaVale, Mt. Savage, Frostburg, Georges Creek Communities, Westernport, McCoole, Danville, Rawlings, Cresaptown and Bowling Green. This development pattern tends to follow the Potomac Valley, the Georges Creek Valley, the Braddock Run Valley and the Jennings Run/Wills Creek Valley in a circular pattern around Dans Mountain and Wills Mountain. Projected growth in the future should be directed to fill in vacant lands within this general pattern.

Under the heading Population Projections, the plan notes:

Between 2000 and 2020, moderate population growth should occur in the suburban areas around Frostburg, Cumberland, LaVale and Ellerslie where services now exist or are planned. Any major new population growth and associated urban development should be concentrated in the Middle Potomac region south of Cresaptown, as community services are extended to that area.

The site is not located in the "figure eight pattern" or in the area south of Cresaptown. However, one Plate included in the Plan included this site as a site suited for urban development.

Because of topography, especially steep slopes, much of Allegany County is unsuitable for development. The Plan noted.

Over 50%, or approximately 150,000 acres of the County's land area is on slopes of greater than 25% grade. Of the remaining land, over 68,000 acres have slopes between 8 and 25% grade, while only 55,000 acres have a slope of less than 8% grade. To date, nearly all of the urban development in the County has occurred on slopes between 0 and 8% grade. Additionally, some of the best agricultural soils in the County are found on these lands. Further, nearly every major stream valley and alluvial flood plain also occurs on these lands. Thus, urban land uses, agricultural land uses, and stream flood plains all occur and compete for approximately 20% of the County's land surface. The remaining land, occurring on slopes steeper than 8% grade, has been used for agriculture, mining, forestry, wildlife habitat, watershed protection areas, orchards, and grazing lands, and some limited urban uses.

The Board granted the special exception, finding that the proposed development was *in harmony* with the Plan. The decision was appealed to the Circuit Court of Allegany County, which opined that the Board should have determined whether the development was *consistent* with the policies and recommendations of the Plan and remanded the case to the Board. This decision was appealed to the Court of Special Appeals, which reversed the decision of the Circuit Court. The Court of Special Appeals essentially held that the terms "*conforms to*," "*is consistent with*," and "*is in harmony with*," have essentially the same meaning. It also noted that a comprehensive plan is not a strict regulatory requirement, but rather a guide.

The Court of Appeals granted certiorari and issued its opinion in March 2008. In a four to three decision, the Court held that the correct standard was "*in harmony with*." Judge Cathell, writing for the majority, stressed that the Plan is merely a guide, and that a special exception could be granted even if it did not strictly conform to the Plan. In an aside (footnote 26) Judge Cathell wrote that, even if "conform" implied a closer congruity than "in harmony with" the decision of the Board was not arbitrary or unsupported by facts.

Recommendations

There was consensus among those on the call that the Court's opinion could be read very narrowly as applying only to special exceptions; however, we also agreed that the sweeping language in Judge Cathell's majority opinion could be interpreted much more broadly, and easily misinterpreted, especially by members of local

boards and commissions. A local official who wanted to completely ignore the jurisdiction's comprehensive plan could find encouragement in the opinion. The opinion downplayed the importance of a comprehensive plan, implying it was only a guide and not a legal standard to be followed. Also, there are potential ramifications involving other State statutes that require consistency with elements of comprehensive plans. Examples we identified were Art. 23A on Municipal Corporations, Section 19(o)(3)(iii), dealing with annexation and Env. Code Section 9-506(a)(1)(ii), dealing with water and sewerage plans.

Because of the potential risk to Smart Growth posed by the opinion, the Workgroup recommends that the Task Force take a position. We identified three possible positions:

1. Make a statement about the opinion. The Task Force could incorporate into its report a statement that

- Notes that the opinion is very narrow and that much of it is *dictum*;
- Reiterates the importance of the comprehensive plan;
- Reinforces the idea that zoning and other land use decisions should be consistent with the comprehensive plan.
- Notes that Section 4.09 of Article 66B, which was not considered by any of the courts, unambiguously requires that "a local jurisdiction shall ensure that the implementation of the provisions of the plan ... are achieved through the adoption of applicable zoning ordinances and regulations, planned development ordinances and regulations, subdivision ordinances and regulations, and other land use ordinances and regulations that are consistent with the plan."
- Points out that comprehensive plans are written and adopted by the local governments in a process that allows public participation, and therefore local governments should follow the comprehensive plans; and
- Reminds local governments that it is always within their power to amend a comprehensive plan as circumstances change.

2. Recommend that the decision be clarified and limited by the legislature. This would involve a very targeted amendment to the definition of special exception. In uncodified "whereas" clauses, the legislature could state its intention to limit the decision and to reiterate that special exceptions must be consistent with the comprehensive plans.

3. Recommend significant, targeted revisions to the law. Multiple changes to the law could be made to undo the potential damage done by the opinion. As examples, a definition of "consistent" could be added and the term could be used unvaryingly in the substantive parts of the statute. A provision could be added requiring that the decision maker make specific factual findings about ways in which a proposed action is consistent or inconsistent with relevant portions of the comprehensive plan and then draw a reasoned conclusion about whether the action is consistent or inconsistent with the comprehensive plan overall. Two members of the Workgroup, Les Knapp and Roger Fink, noted their objections to this recommendation, citing concerns about the unintended consequences of making significant revisions that would apply to the entirety of Article 66B.